A

PP

v.

SIM, ODITA, MUHAMMAD ARCHITECTS SDN BHD

B

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CRIMINAL APPEAL NO: 42-11-2004-II]
18 SEPTEMBER 2007

C ***COPYRIGHT:*** *Offences - Section 41(1)(d) Copyright Act 1987 - Possession of infringing copies of computer programs during subsistence of copyright - Appeal against acquittal and discharge - Whether actual possession proved - Whether use for business purposes - Whether original copies tendered for comparison purposes - Whether opportunity for*
D *tampering existed - Whether break in the chain of evidence*

The respondent company was acquitted and discharged in the sessions court on four charges under s. 41(1)(d) of the Copyright Act 1987 ('CA'), *inter alia*, for having in its possession infringing copies of computer programs during the subsistence of copyright.
E The prosecution appealed against the acquittal and discharge.

Held (dismissing the appeal):

(1) The prosecution failed to prove actual physical possession of
F the alleged infringing copies of computer programs. Evidence showed that other companies also shared the premises of the respondent company. That itself was sufficient to sustain the order of acquittal. (para 6)

G **(2)** The prosecution failed to adduce any evidence tending to show that the alleged infringing copies of the computer programs were used for business purposes. (para 7)

(3) It was not clear which of the literary works the prosecution relied on to prove subsistence of copyright as the prosecution
H merely relied on statutory declarations which were not made and/or declared before a person having authority to administer oath. Strict compliance of the CA is a condition precedent to establish subsistence of copyright. (para 8)

I

(4) The prosecution failed to tender original copies of the computer programs allegedly eligible for copyright protection. Therefore, the learned judge was not in the position to make comparison between the original copies of the computer programs and the alleged infringing programs. That was fatal to the prosecution. (para 9)

(5) If evidence showed that there was opportunity for tampering to exist, there would be a break in the chain of evidence, irrespective of whether the opportunity was taken or not. Copyright infringement in relation to software required the prosecution to ensure that the exhibits are not easily tampered with. Any doubt as to the possibility of tampering ought to be made in favour of the accused. (paras 10 & 12)

(6) Throughout the testimony of the prosecution witnesses there was not a single shred of evidence that showed that the seized exhibits were safe from the danger of being tampered with. Instead, their testimony suggested that there was a danger of the seized exhibits being tampered with. That doubt alone was sufficient to acquit the respondent. (para 12)

Case(s) referred to:
Abdul Rashid v. PP [1994] 1 SLR 119 ***(refd)***
Abdullah Yaacob v. PP [1991] 2 CLJ 853; [1991] 1 CLJ (Rep) 5 SC ***(refd)***
Lee Chee Meng v. PP [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC ***(refd)***
Mohd Osman Pawan v. PP [1989] 2 CLJ 388; [1989] 1 CLJ (Rep) 108 SC ***(refd)***
Pavone v. Public Prosecutor (No 2) [1985] 1 LNS 99 HC ***(refd)***
PP v. Mansor MD Rashid & Ors [1993] 4 CLJ 266 HC ***(refd)***
PP v. Sivakumar Ammasi [2003] 6 CLJ 152 HC ***(refd)***
Satli Masot v. PP [1999] 2 SLR 637 ***(refd)***
Sia Soon Suan v. PP [1965] 1 LNS 165 FC ***(refd)***
Su Ah Ping v. PP [1979] 1 LNS 100 FC ***(refd)***
Sun Kam Heng v. PP [1993] 1 CLJ 109 SC ***(refd)***
Teoh Hoe Chye v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC ***(refd)***
Yeong Kia Heng v. PP [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 SC ***(refd)***

Legislation referred to:
Copyright Act 1987, s. 41(1)(d), (4)
Internal Security Act 1960, s. 2

For the appellant - Fazillah Begum Abdul Ghani; SFC
For the respondent - Ratanah Devi; M/s Idris & Co, Advocates

Reported by Usha Thiagarajah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the prosecution's appeal against the learned sessions judge who acquitted and discharged the respondents who were charged with four charges under s. 41(1)(d) of the Copyright Act 1987 (CA 1987), on the charge *inter alia* that the respondents had in their possession infringing copies of computer programs during the subsistence of copyright, otherwise than for its private and domestic use.

[2] The four charges read as follows:

Amended Pertuduhan Pertama

Bahawa kamu pada 11 Mei 1999, kira-kira jam 2.50 petang, di premis SIM, ODITA, MUHAMMAD ARCHITECTS SDN. BHD., Lot No. 5684, Section 64, KTLD, Three Hill Parks, Kuching di dalam Daerah Kuching, di dalam Negeri Sarawak, tatkala hakcipta ujud di dalam karya sastera, kamu ada memiliki bagi apa-apa kegunaan selain daripada kegunaan domestic, salinan-salinan karya sastera dalam bentuk program komputer bertajuk AutoCAD 12 for Dos didalam 'Central Processing Unit' seperti berikut:

1) 'Central Processing Unit' Serial No. P 062711 yang dijumpai di Tingkat Dua;

2) 'Central Processing Unit' Serial No. P 364750 yang dijumpai di Tingkat Dua;

3) 'Central Processing Unit' Serial No. P 142967 yang dijumpai di Tingkat Dua;

4) 'Central Processing Unit' Serial No. P 3450502873 yang dijumpai di Tingkat Dua;

5) 'Central Processing Unit' tanpa Serial No. yang dijumpai di Tingkat Dua;

6) 'Central Processing Unit' tanpa Serial No. yang dijumpai di Tingkat Dua;

7) 'Central Processing Unit' Serial No. TA 551V9967 yang dijumpai di Tingkat Dua;

8) 'Central Processing Unit' Serial No. TA 551VA079 yang dijumpai di Tingkat Dua;

9) 'Central Processing Unit' Serial No. VM 040629-9409-060 yang dijumpai di Tingkat Dua;

10) 'Central Processing Unit' tanpa Serial No. yang dijumpai di Tingkat Dua;

sebagai salinan langgaran, yang mana hakcipta karya tersebut keempunyaan Autodesk Incorporation, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 41(1)(d) Akta Hakcipta 1987 dan jika disabitkan kesalahan boleh dihukum di bawah Seksyen 41(1)(i), Akta yang sama. (UNDANG-UNDANG MALAYSIA AKTA NO. 332)

Pertuduhan Kedua

Bahawa kamu pada 11 Mei 1999, kira-kira jam 2.50 petang, di premis SIM, ODITA, MUHAMMAD ARCHITECTS SDN. BHD., Lot No. 5684, Section 64, KTLD, Three Hill Park, Kuching, di dalam Daerah Kuching, di dalam Negeri Sarawak, tatkala hakcipta ujud di dalam karya sastera, kamu ada memiliki bagi apa-apa kegunaan selain daripada kegunaan domestic, salinan-salinan karya sastera dalam bentuk program komputer bertajuk Windows 95 di dalam 'Central Processing Unit' seperti berikut:

1) 'Central Processing Unit' Serial No. P 051985 yang dijumpai di Tingkat Satu;

2) 'Central Processing Unit' Serial No. P 364750 yang dijumpai di Tingkat Dua;

3) 'Central Processing Unit' Serial No. P 142967 yang dijumpai di Tingkat Dua;

4) 'Central Processing Unit' Serial No. P 3450502873 yang dijumpai di Tingkat Dua;

5) 'Central Processing Unit' Serial No. TA 551V9967 yang dijumpai di Tingkat Dua;

6) 'Central Processing Unit' Serial No. TA 551VA079 yang dijumpai di Tingkat Dua;

A 7) 'Central Processing Unit' tanpa Serial No. yang dijumpai di Tingkat Dua;

8) 'Central Processing Unit' Serial No. P 364963 (57504) yang dijumpai di Tingkat Bawah;

B sebagai salinan langgaran, yang mana hakcipta karya tersebut keempunyaan Microsoft Corporation, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 41(1)(d) Akta Hakcipta 1987 dan jika disabitkan kesalahan boleh dihukum di bawah Seksyen 41(1)(i), Akta yang sama. (UNDANG-UNDANG C MALAYSIA AKTA NO. 332)

Pertuduhan Ketiga

Bahawa kamu pada 11 Mei 1999, kira-kira jam 2.50 petang, di premis SIM, ODITA, MUHAMMAD ARCHITECTS SDN. D BHD., Lot No. 5684, Section 64, KTLD, Three Hill Park, Kuching, di dalam Daerah Kuching, di dalam Negeri Sarawak, tatkala hakcipta ujud di dalam karya sastera, kamu ada memiliki bagi apa-apa kegunaan selain daripada kegunaan domestic, salinan karya sastera dalam bentuk program komputer bertajuk Adobe Page Maker 6.0 di dalam 'Central Processing Unit' bernombor E Serial P 364750 yang dijumpai di Tingkat Dua, sebagai salinan langgaran, yang mana hakcipta karya tersebut keempunyaan Adobe Systems Incorporated, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 41(1)(d) Akta Hakcipta 1987 dan jika disabitkan kesalahan boleh dihukum di bawah Seksyen 41(1)(i), F Akta yang sama. (UNDANG-UNDANG MALAYSIA AKTA NO. 332)

Amended Pertuduhan Keempat

Bahawa kamu pada 11 Mei 1999, kira-kira jam 2.50 petang, di premis SIM, ODITA, MUHAMMAD ARCHITECTS SDN. G BHD., Lot No. 5684, Section 64, KTLD, Three Hill Park, Kuching, di dalam Daerah Kuching, di dalam Negeri Sarawak, tatkala hakcipta ujud di dalam karya sastera, kamu ada memiliki bagi apa-apa kegunaan selain daripada kegunaan domestic, salinan-salinan karya sastera dalam bentuk program komputer bertajuk H Office 4.3 Professional di dalam 'Central Processing Unit' seperti berikut:

1) 'Central Processing Unit' Serial No. DH 11272-9303-060 yang dijumpai di Tingkat Satu;

I 2) 'Central Processing Unit' Serial No. P 5772101639 yang dijumpai di Tingkat Satu;

3) 'Central Processing Unit' Serial No. P 062711 yang dijumpai di Tingkat Dua;

4) 'Central Processing Unit' Serial No. P 4223331 yang dijumpai di Tingkat Dua;

sebagai salinan langgaran, yang mana hakcipta karya tersebut keempunyaan Microsoft Corporation, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 41(1)(d) Akta Hakcipta 1987 dan jika disabitkan kesalahan boleh dihukum di bawah Seksyen 41(1)(i), Akta yang sama. (UNDANG-UNDANG MALAYSIA AKTA NO. 332)

1. The above-named Respondent was charged with an offence specified in the following charges:-

(1) Amended Pertuduhan Pertama

Bahawa kamu pada 11 Mei 1999, kira-kira jam 2.50 petang, di premis SIM, ODITA, MUHAMMAD ARCHITECTS SDN. BHD., Lot No. 5684, sebagai salinan langgaran, yang mana hakcipta karya tersebut keempunyaan Autodesk Incorporation, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 41(1)(d) Akta Hakcipta 1987 dan jika disabitkan kesalahan boleh dihukum di bawah Seksyen 41(1)(i), Akta yang sama. (UNDANG-UNDANG MALAYSIA AKTA NO. 332)

(2) Pertuduhan Kedua

Bahawa kamu pada 11 Mei 1999, kira-kira jam 2.50 petang, di premis SIM, ODITA, MUHAMMAD ARCHITECTS SDN. BHD., Lot No. 5684, Section 64, KTLD, Three Hill Park, Kuching, di dalam Daerah Kuching, di dalam Negeri Sarawak, tatkala hakcipta ujud di dalam karya sastera, kamu ada memiliki bagi apa-apa kegunaan selain daripada kegunaan domestic, salinan-salinan karya sastera dalam bentuk program komputer bertajuk Windows 95 di dalam 'Central Processing Unit' seperti berikut:

1) 'Central Processing Unit' Serial No. P 051985 yang dijumpai di Tingkat Satu;

2) 'Central Processing Unit' Serial No. P 364750 yang dijumpai di Tingkat Dua;

3) 'Central Processing Unit' Serial No. P 142967 yang dijumpai di Tingkat Dua;

4) 'Central Processing Unit' Serial No. P 3450502873 yang dijumpai di Tingkat Dua;

A 5) 'Central Processing Unit' Serial No. TA 551V9967 yang dijumpai di Tingkat Dua;

6) 'Central Processing Unit' Serial No. TA 551VA079 yang dijumpai di Tingkat Dua;

B 7) 'Central Processing Unit' tanpa Serial No. yang dijumpai di Tingkat Dua;

8) 'Central Processing Unit' Serial No. P 364963 (57504) yang dijumpai di Tingkat Bawah;

C sebagai salinan langgaran, yang mana hakcipta karya tersebut keempunyaan Microsoft Corporation, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 41(1)(d) Akta Hakcipta 1987 dan jika disabitkan kesalahan boleh dihukum di bawah Seksyen 41(1)(i), Akta yang sama. (UNDANG-UNDANG MALAYSIA AKTA NO. 332)

D

(3) Pertuduhan Ketiga

Bahawa kamu pada 11 Mei 1999, kira-kira jam 2.50 petang, di premis SIM, ODITA, MUHAMMAD ARCHITECTS SDN. BHD., Lot No. 5684, Section 64, KTLD, Three Hill Park, E Kuching, di dalam Daerah Kuching, di dalam Negeri Sarawak, tatkala hakcipta ujud di dalam karya sastera, kamu ada memiliki bagi apa-apa kegunaan selain daripada kegunaan domestic, salinan karya sastera dalam bentuk program komputer bertajuk Adobe Page Maker 6.0 di dalam 'Central Processing Unit' bernombor F Serial P 364750 yang dijumpai di Tingkat Dua, sebagai salinan langgaran, yang mana hakcipta karya tersebut keempunyaan Adobe Systems Incorporated, den dengan itu kamu telah melakukan kesalahan di bawah Seksyen 41(1)(d) Akta Hakcipta 1987 dan jika disabitkan kesalahan boleh dihukum di bawah Seksyen 41(1)(i), G Akta yang sama. (UNDANG-UNDANG MALAYSIA AKTA NO. 332)

(4) Amended Pertuduhan Keempat

Bahawa kamu pada 11 Mei 1999, kira-kira jam 2.50 petang, di premis SIM, ODITA, MUHAMMAD ARCHITECTS SDN. H BHD., Lot No. 5684, Section 64, KTLD, Three Hill Park, Kuching, di dalam Daerah Kuching, di dalam Negeri Sarawak, tatkala hakcipta ujud di dalam karya sastera, kamu ada memiliki bagi apa-apa kegunaan selain daripada kegunaan domestic, salinan-salinan karya sastera dalam bentuk program komputer bertajuk I Office 4.3 Professional di dalam 'Central Processing Unit' seperti berikut:

1) 'Central Processing Unit' Serial No. DH 11272-9303-060 yang dijumpai di Tingkat Satu;

2) 'Central Processing Unit' Serial No. P 5772101639 yang dijumpai di Tingkat Satu;

3) 'Central Processing Unit' Serial No. P 062711 yang dijumpai di Tingkat Dua;

4) 'Central Processing Unit' Serial No. P 42233 yang dijumpai di Tingkat Dua;

sebagai salinan langgaran, yang mana hakcipta karya tersebut keempunyaan Microsoft Corporation, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 41(1)(d) Akta Hakcipta 1987 dan jika disabitkan kesalahan boleh dihukum di bawah Seksyen 41(1)(i), Akta yang sama. (UNDANG-UNDANG MALAYSIA AKTA NO. 332)"

Petition Of Appeal

[3] The appellant's petition of appeal *inter alia* states that the learned sessions judge had erred in law and in fact. The grounds for the same are that:

(i) there was a break in the chain of evidence; (ii) the learned sessions judge misdirected herself in finding that there was a likelihood of the seized computers being tampered with thereby causing the break in the chain of evidence. (iii) in holding the view that the prosecution has not established *prima facie* evidence in respect of the first charge. (iv) in her consideration that the first charge is defective without giving proper significance and that the accused was neither prejudiced nor mislead. (v) in her finding when she said "in conclusion, let me say that but for that there is doubt whether there might be tampering of the serial number of the program found in the seized computer while they were in the custody of PW1 before the transfer, I would have otherwise found that the defence has not successfully waged their defence under s. 41(4) of the Act on the balance of probability required of them, and that I would have concluded that the prosecution has proved its case beyond reasonable doubt. Since I do entertain that the doubt that the chain of handling the seized computers might have been broken, it is my finding that the prosecution has not established the case beyond reasonable doubt and I order that the accused be discharged and acquitted".

A

Brief Facts

[4] Evidence was before the court that subsequent to a written complaint dated 11 May 1999 received by the Ministry of Domestic Trade and Consumers Affairs, Simpang Tiga, Kuching
B Branch from Messrs Raja, Darryl & Loh, Advocates acting for and on behalf of Business Software Alliance (BSA), Adobe Systems, Inc. ("Adobe"), Autodesk Inc. ("Autodesk"), Corel Corporation ("Corel") and Microsoft Corporation ("Microsoft"), a warrant of search was obtained from the court and consequently a raid was
C conducted at the business address of the respondent on the same. During the raid 17 units of computers were seized and brought back to the office of Ministry of Domestic Trade and Consumers Affairs, Simpang Tiga, Kuching Branch. The units of seized computers were kept at the office of Ministry of Domestic Trade
D and Consumers Affairs, Simpang Tiga, Kuching Branch until the day of the trial. Out of the 17 computers which were seized, only 15 units of computers were related to the charges against the respondent. Prosecution called 14 witnesses. Defence called four witnesses comprising the directors, associate directors and architect
E of the respondent company and the chief executive officer of Sarawak Software to testify on behalf of them. In respect of the first ingredient, the defence through the testimony of DW1 and DW2 adduced evidence that the business premises which was raided by the officers of Ministry of Domestic Trade and
F Consumers Affairs, Simpang Tiga, Kuching Branch on 11 May 1999 was occupied by other companies namely Austral Avenue Sdn Bhd, Liberty Computers Services Ltd and Liberty Shine Sdn Bhd.

G

Ingredient Of The Charges

[5] The ingredients of the charges under s. 41(1)(d) which the prosecution has to establish can be summarised as follows: (i) that the respondent company had in possession the alleged infringing copies of computer programs; (ii) that the said infringing copies of
H computer programs were not for their private and domestic use; (iii) that copyright subsisted in the said computer programs in favour of the owners named in the charges; (iv) that the said computer programs are infringing copies.

I

Possession – 1st Ingredient

[6] The word "possession" is not defined in the CA 1987 and therefore it is pertinent to refer to judicial decisions involving criminal charges to guide us to define the word "possession". Thus, it was the contention of the defence that prosecution has to establish physical possession of the alleged infringing programs by the accused. The prosecution failed to prove actual physical possession of the alleged infringing copies of computer programs, as evidence was before the court that the premises of the accused was not for the sole usage of the accused company but also shared among the other companies mentioned above. This by itself, in my view, is sufficient to sustain the order of acquittal.

Private And Domestic – 2nd Ingredient

[7] In respect of the 2nd ingredient, it was the contention of the defence that the prosecution failed to adduce any evidence tending to show that the alleged infringing copies of the computer programs were used by the accused for their business purposes. This is another point which goes in favour of the respondent.

Copyright – 3rd Ingredient

[8] In respect of the third ingredient, the defence contended that in general there are eight categories of literary works that are eligible for protection under the CA 1987. However, the defence argued that it is not clear which of the literary works the prosecution is relying on to prove subsistence of copyright, as the prosecution merely relied on the statutory declarations of Jonathan Selvasegaram, purportedly affirmed on behalf of Microsoft Corporation; Raymond Lee purportedly affirmed on behalf of Adobe System Incorporation; and Chua Cheng Boon purportedly affirmed on behalf of Autodesk Incorporated. It was the contention of the defence that the statutory declarations mentioned above were not made and/or declared before a person having authority to administer oath and as such should not be admitted as evidence. In my view strict compliance of the CA 1987 is a condition precedent to establish subsistence of copyright.

Infringing Copies – 4th Ingredient

[9] As to the fourth ingredient, it is the contention of the defence that the prosecution failed to prove this ingredient due to the fact that the prosecution failed to tender original copies of the

A computer programs, allegedly eligible for copyright protection. Thus, the trial court was not in the position to make comparison between the original copies of the computer programs and the alleged infringed program. In my view, this is fatal to the prosecution.

B

Breach In Chain Of Evidence

[10] It was also the contention of the defence case that there is break in chain of evidence, as during the testimonies of the prosecution and the defence witnesses, evidence tends to show C that there is opportunity for tampering to exist. If the opportunity of tampering existed, there would be a break in the chain of evidence, irrespective of whether the opportunity was taken or not.

D **[11]** I have read the submissions of the appellant and the respondents in detail. The learned sessions judge had meticulously dealt with all the facts and evidence and the law in detail. I find no reasons to disturb the same. Further, the petition of appeal has specifically focused on the issue of break in chain of evidence. E On this issue, I have specifically requested both the prosecution and the respondent to submit on the law in respect of break in chain of evidence. The respondent has submitted on this issue and it was helpful for me to write this judgment.

F **[12]** The law in respect of break in chain of evidence is not specifically anchored in the Evidence Act or Criminal Procedure Code. The law has been developed as a cautionary approach to ensure exhibits are not tampered with in cases where physical tampering is possible such as in cases of drug offences and alike. G It will not equally apply to cases where the exhibits cannot be tampered with such as tables, chairs, etc. Copyright infringement in relation to software as in this case requires the prosecution to ensure that the exhibits are not easily tampered with. Any doubt as to the possibility of tampering ought to be made in favour of H the accused, as usually done in drug cases. My reasons are as follows:

(i) The law on break in chain of evidence is an area of law which has a close connection with the law of evidence in particular I and also the general principles of criminal law and procedure, to meet out substantive justice on the basis of beyond reasonable doubt.

(ii) The cardinal principle in a criminal trial is based on the golden rule that the prosecution must prove its case beyond reasonable doubt. In the Supreme Court case of *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC it was held that "the law is clear that it is unnecessary to call evidence to ensure that there is no break in the chain of evidence but where a doubt arises as to the identity of an exhibit, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case."

(iii) By applying the principles in the case of *Teoh Hoe Chye, (supra)* doubt arises as to whether the seized computers were in the original state. Testimony of the prosecution witnesses reveal that the seized computers were kept in his personal room, later the same witness told the court that the room was shared with another officer and that room is not a special room to keep exhibits. Coupled with the fact that the room where the computers were kept was shared between officers who had an easy access, doubt arises as to whether the seized computers were exposed to the danger of being tampered. It is the duty of the prosecution to explain the gap in the manner the exhibits being handled. However, the prosecution failed to adduce evidence to explain the gap. In the premises, the learned sessions court judge had properly decided that there was break in the chain of evidence which was fatal to the prosecution's case.

(iv) Break in chain of evidence could occur when the prosecution fails to call material witness to establish their case and or when exhibits are dealt with in a vague manner. In our present case, the issue of failure to call material witness does not arise. The only concern is whether there is break in chain of evidence, whereby there was doubt as to whether the seized exhibits were exposed to the danger of being tampered with. The testimony of the witnesses failed to explain beyond reasonable doubt that there was no serious break in chain of evidence, particularly the manner in which the seized exhibits were handled. The learned sessions court judge ruled that there is break in chain of evidence and doubt arises as to the manner in which the seized exhibits were being kept before being produced in court. Throughout the testimony of the

witnesses for the prosecution there is no single shred of evidence showing that the seized exhibits were safe from the danger of being tampered with. Instead, the testimony of the prosecution witnesses tend to suggests that there is danger of the seized exhibits being tampered with.

(v) This doubt alone is sufficient to acquit the accused and not to disturb the learned sessions court judge's findings since she had correctly evaluated the evidence before her.

(vi) The principles laid down in various cases on point of break in chain of evidence can be summarised as follows:

(a) In the case of *Pavone v. Public Prosecutor (No. 2)* [1985] 1 LNS 99 where it involved drugs it was held that the exhibits should have been packed and sealed by each of those who handled the exhibits. The exhibits were handed to the officer in charge of the station for safekeeping but no steps were taken to ensure that the exhibits were not tampered with. No evidence was led as to where the exhibits were kept until they were handed to the investigating officer during the afternoon of the next day. No evidence was led as to what the investigating officer did with the exhibits before he finally packed and sealed the package. The court held:

> In the light of the patent and unexplained difference in the findings of the ASP in conducting the field test and that of the Chemist, the cavalier manner in which the exhibits were handled becomes significant and in all the circumstances obtaining in this case amount to missing links in the chain of evidence.

(b) In the case of *Sia Soon Suan v. Public Prosecutor* [1966] 1 MLJ 116 the court held:

> (2) since the evidence of handing over the grenades and ammunition to the police depended entirely on the evidence of PW4 alone and he was contradicted by ASP Zainal Abidin it can hardly be said that the prosecution had proved by evidence beyond all reasonable doubt that the articles allegedly found on the person of the appellant were handed over to the police and that these were the very same articles located in one of the groups;

(3) the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this Court is otherwise convinced in its own mind of guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else … .

(c) In the case of *Abdul Rashid v. PP* [1994] 1 SLR 119 the Singapore Court of Criminal Appeal held as follows:

> It is well settled on the authorities that the prosecution bears the burden of proving beyond reasonable doubt that the package seized from the first appellant's car was the substance eventually analyzed by Dr Lee and found to contain 76.3g of diamorphine. The common thread that runs through all the cases which deal with the chain of possession and a doubt arises as to the identity of these exhibits then the prosecution has not discharged the burden.

(d) The Singapore Court of Appeal in *Satli bin Masot v. PP* [1999] 2 SLR 637 held that in cases where a break in the chain of evidence was alleged, the issue for the court's determination was whether, on the evidence adduced before the court any doubt had been raised on the identity of the drug exhibits. While the prosecution bore the burden of proving beyond a reasonable doubt that there were no gaps in the chain of evidence it did not follow that in order to establish the identity of the drug exhibits all persons who had handled the drugs must be called as witnesses. The court opined: "The guiding principle was whether a doubt as to the identity of the exhibits had arisen. Only when such a doubt had arisen would it be necessary for the prosecution to call all necessary witnesses so as to provide the necessary links in the chain of evidence".

(e) In the case of *Sun Kam Heng v. Public Prosecutor* [1993] 1 CLJ 109 it was held that there was no evidence that the firearm which had been snatched from the appellant's hand had been enclosed in a sealed envelope when placed in the safe, nor was the safe register produced to demonstrate to the court beyond reasonable doubt what the safe contained during the three days when the firearm was kept in the safe; the evidence regarding the movement of the exhibits to the armourer, the chemist and then back

to the IO did not repair the gap in the prosecution case regarding the whereabouts of the exhibits during the three days when the exhibits were allegedly lying in Bahadom's safe. Bahadom was never called nor offered by the prosecution to the defence. There was also no explanation in the trial and the appellate courts for these glaring omissions. If there was a break in chain of evidence at any time before the exhibits were allegedly sent to the armourer, then the testimony of the armourer and the chemist report would have to be disregarded as being irrelevant to the charges. In such circumstances without the armourer's testimony and the chemist report, there would be insufficient evidence that what had been snatched from the appellant's hand came within the definitions of 'firearm' and 'ammunition' in s. 2 of the 1960 Act.

(f) In the case of *Abdullah Yaacob v. Public Prosecutor* [1991] 2 CLJ 853; [1991] 1 CLJ (Rep) 5 where it was stated in *Su Ah Ping v. PP* [1979] 1 LNS 100 where the court opined: "that it is not required for the prosecution to call all the officers or the persons concerned who had seen or identified an exhibit." This is not the real intention of the law. *Su Ah Ping (supra)* only decided the general principles. But the facts of one case differ from those of another and the duty of the prosecution in each case is to prove the case beyond any reasonable doubt to the court. The case must be clearly proved without (reasonable) doubt or question that can be raised about the exhibits.

(g) In the case of *Mohd Osman Pawan v. Public Prosecutor* [1989] 2 CLJ 388; [1989] 1 CLJ (Rep) 108 the court opined that:

> … it is pertinent to emphasize again that investigation officers should not treat the custody of exhibits lightly so as to leave a gap in the chain of evidence relating to the exhibits before their production in court.

(h) In the case of *Yeong Kia Heng v. Public Prosecutor* [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 it was held:

> The burden of proof is heavy and the burden of proof that is borne by the prosecution is also heavy. There is no burden borne by the accused to prove that he is not

guilty. In a criminal trial the accused is allowed to take every opportunity to show the defects in the prosecution case. The defect regarding the identity of the exhibits is serious.

(i) In the case of *Lee Chee Meng v. Public Prosecutor* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 it was held:

(1) The totality of the evidence in this case did not support the conclusion of the learned trial judge that the appellant had exclusive use of the room. The burden on the appellant in this respect was merely to cast a reasonable doubt. … The doubt as to exclusive use of the room by the appellant alone could be sufficient ground to allow the appeal.

(2) There was a serious flaw in the prosecution case in the evidence relating to the exhibits. Firstly, no evidence was given as to the weight of the ten packets of drugs found in the second accused's vanity case. Since the total weight of the drugs in the charge was 23.71g, that is, only 8.71g above the statutory limit of s. 37(da)(iiia) of the Act, the weight of the ten packets of drugs in the vanity case was crucial to sustain the charge against the appellant. Secondly, there were discrepancies in the witnesses' evidence as to the number of packets of drugs involved.

(3) There was a serious doubt as to the identity of the exhibits in this case and therefore it could not be said that the prosecution had established a *prima facie* case under the charge.

(j) In the case of *PP v. Sivakumar Ammasi* [2003] 6 CLJ 152 the court stated that:

There is now clearly a doubt as to whether the exhibits actually sent to the chemist were the same exhibits that were said to have been safely secreted in the cloistered chambers of SP6's cabinet. In this respect it is appropriate to refer to *Teoh Hoe Chye v. PP; Yeap Teong Team* [1987] 1 CLJ 471; [1987] CLJ 386 (Rep) where the then Supreme Court also made a similar critical comment as to the absence of explanations as to what happened to the exhibits between the time they were handed to the investigating officer and to the time they were examined by the chemist. … On this ground that

A there is a doubt as to the exhibits seized and considering the break in the chain of evidence, this court has to acquit the accused.

(k) In the case of *PP v. Mansor MD Rashid & Ors* [1993] 4 CLJ 266 the accused were acquitted and discharged due to break in chain of evidence. The court held:

> Firstly, the evidence adduced by the Government Chemist (PW1), was far from satisfactory. In point of fact, her testimony shows not only the cavalier manner in which the incriminating exhibits which forms the material particulars of the charge, were handled but also the easy manner by which she deposed to the way the incriminating exhibits were examined and analysed which leaves in my mind the patent weakness in the prosecution's case. ... At first blush what the Government chemist did was perfectly in order. But a close scrutiny would indicate a patent break in the chain of evidence pertaining to the compressed plant material. There was not a shred of evidence adduced by the prosecution as to how the Government Chemist handled the compressed plant material in her office. The prosecution failed miserably to show positively the appropriate steps taken by the Government chemist to ensure the safe custody of the compressed plant materials.

[13] The issue of break in chain of evidence is normally considered by the court before coming to a conclusion whether the prosecution has proved its case against the accused beyond reasonable doubt. The accused is eligible to an acquittal, if there is break in chain of evidence and or gap occurs in prosecution's case. Thus, it is important for the prosecution to ensure that there is no break in the chain of evidence adduced before the court. When chain of evidence is broken and subsequently due to the break doubt arises on prosecution's case, it is the duty of the prosecution to remedy the break and or to fill in the gap. Failure of the prosecution to remedy or to fill the gap will absolutely create doubt in the mind of the court. Once doubt is created, prosecution's case fails and this would benefit the accused, and accordingly the accused shall be eligible to an acquittal and discharge. In the case of *Mohd Osman Pawan v. PP* [1989] 2 CLJ 388; [1989] 1 CLJ (Rep) 108 it was held "in a serious case such

as trafficking in drugs it is pertinent to emphasize again that investigating officers should not treat the custody of exhibits lightly so as to leave a gap in the chain of evidence relating to the exhibits before their production to court".

[14] For reasons stated above, I take the view that the decision of the learned sessions judge ought not to be disturbed. In consequence, the appeal is dismissed. I hereby order so.